DING SIEW CHING A

v.

LING PEEK HOE

COURT OF APPEAL, PUTRAJAYA B
CLEMENT SKINNER JCA
AZIAH ALI JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: A-02-203-2010]
2 OCTOBER 2013 C

LEGAL PROFESSION: *Disciplinary proceedings - Disciplinary committee - Findings of - Whether within scope of complaint - Whether main findings consistent with subsidiary findings*

LEGAL PROFESSION: *Professional discipline - Misconduct - Advocate and solicitor suspended from practice for 18 months - Whether punishment adequate and proportionate to degree of professional misconduct* D

The respondent lodged a complaint against the appellant, an advocate and solicitor, to the Disciplinary Board of the Bar E Council ('DB') that he had lost two pieces of land to the appellant's brother through the appellant's fraudulent misrepresentation. Following the complaint, an investigating tribunal was set up and subsequently presented a report and recommendation that there should be a formal investigation by a F Disciplinary Committee ('DC'). The DC made the finding that the appellant, *inter alia* (i) knowing that the respondent was a customer of a moneylending firm in which her brothers were partners, had prepared the sale and purchase agreements for both parties; (ii) did not take positive steps to avert the consequences G of conflict of interest; (iii) carried out a lot of work as solicitor for the respondent without the respondent's authority in writing or his knowledge; and (iv) knew that the deposits and the balance of purchase prices were in fact not paid to the respondent but utilised to contra or settle moneylending transactions. Pursuant to H the DC's recommendation, the DB ordered suspension of the appellant from practice for a period of 18 months. The appellant appealed against the order to the High Court. However, the appellant's appeal was dismissed by the High Court. Hence the present appeal. The issues raised by the appellant in the appeal I were: (i) the complaint against her was confined to allegations of

A fraudulent misrepresentation and fraud and since the DC had come to a finding that the allegations against her must be dismissed as it had not been proven beyond reasonable doubt, it was wrong for the DC to go on to find that 'there was a serious degree of conflict of interest, a touch of dishonesty and a great
B deal of lack of professional transparency'; (ii) the High Court Judge ('HCJ') did not hand down his written grounds of judgment and hence, had failed in his duty to explain the reasons for his decision; and (iii) the imposition of 18 months suspension from practice was manifestly excessive, disproportionate and without
C factual or legal justification warranting appellate intervention.

Held (dismissing appeal with costs)
Per Clement Skinner JCA delivering the judgment of the court:

D
(1) Although the main thrust of the complaint against the appellant was of fraudulent misrepresentation or that she had allowed herself to be used as an instrument of fraud, the complaint arose in the context of a land transaction involving the appellant's own brothers where the complaint included an
E allegation that the respondent had trusted the appellant as a lawyer. Even though the letter of complaint was drafted in layman's terms, an allegation that trust had been reposed by the respondent in the appellant as the lawyer handling the transaction must necessarily include an expectation that the
F appellant would look after his best interests in the transaction. (para 11)

(2) The DC's findings were in respect of matters which were well within the scope of the complaint being investigated into by
G the DC. As the complaint was not limited to the question of fraud alone, the contention that the main findings of the DC were inconsistent with its subsidiary findings was without substance. (para 13)

H **(3)** The HCJ, in arriving at his decision, had the benefit of the report prepared by the DC which was a very detailed report containing the findings of facts of the DC. Even though the HCJ did not give detailed reasons for his decision, by affirming the decision of the DB which had accepted the findings and
I recommendations of the DC, the HCJ, sitting in appeal, had clearly decided not to interfere with the findings of fact made by the DC. (para 16)

(4) The findings of the DC clearly established that in carrying out her duties as an advocate and solicitor in relation to the transaction involving the respondent, the appellant's conduct had amounted to professional misconduct, in that, she had paid little or no attention to the fact that a conflict of interest existed or that she was not bothered with the consequence of such conflict. The appellant also had shown little or no regard to safeguard the interest of the respondent. (para 19)

(5) There was no reason to interfere with the decision of the DB to suspend the appellant from practice for 18 months. The DB, a statutorily constituted body of persons plays an important role in upholding the high standards of professional conduct and etiquette in the legal profession and acts as the custodian of the high traditions of the noble profession. The decision of the DC and the DB could not be described as being absurd so as to warrant appellate interference and the punishment were not excessive or disproportionate to the degree of professional misconduct of the appellant which was described as serious. (para 20)

Bahasa Malaysia *Translation Of Headnotes*

Responden membuat aduan terhadap perayu, seorang peguambela dan peguamcara, kepada Lembaga Tatatertib Majlis Peguam ('LT') bahawa dia kehilangan dua bidang tanah kepada abang perayu melalui salah nyata frod oleh perayu. Berikutan aduan tersebut, sebuah tribunal siasatan ditubuhkan dan kemudiannya mengemukakan laporan dan cadangan bahawa perlu ada siasatan secara formal oleh Jawatankuasa Tatatertib ('JT'). JT membuat dapatan bahawa perayu, antara lain (i) mengetahui bahawa responden adalah pelanggan firma pinjaman wang di mana abang-abangnya adalah rakan kongsi, telah menyediakan perjanjian jual beli bagi kedua-dua pihak; (ii) tidak mengambil langkah-langkah positif untuk mengelak kesan konflik kepentingan; (iii) melakukan banyak kerja sebagai peguamcara responden tanpa kuasa responden dalam tulisan atau pengetahuannya; dan (iv) mengetahui bahawa deposit-deposit dan baki harga belian sebenarnya tidak dibayar kepada responden tetapi digunakan untuk kontra atau menyelesaikan transaksi pinjaman wang. Berikutan cadangan JT, LT memerintahkan penggantungan perayu dari amalan bagi tempoh 18 bulan. Perayu merayu terhadap perintah Mahkamah Tinggi. Walau bagaimanapun, rayuan perayu ditolak oleh Mahkamah Tinggi. Maka rayuan ini.

Isu-isu yang dibangkitkan oleh perayu dalam rayuan adalah: (i) aduan terhadapnya terhad kepada dakwaan salah nyata frod dan frod dan oleh sebab JT telah membuat dapatan bahawa dakwaan-dakwaan terhadapnya perlu ditolak kerana ia tidak dibuktikan melampaui kerayuan munasabah, adalah salah bagi JT untuk meneruskan untuk membuat dapatan bahawa 'there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency'; (ii) Hakim Mahkamah Tinggi ('HMT') tidak memberikan alasan penghakiman bertulis dan dengan itu, telah gagal dalam tanggungjawabnya untuk menjelaskan alasan-alasan bagi keputusannya; dan (iii) pengenaan penggantungan 18 bulan daripada amalan adalah nyata berlebihan, tidak seimbang dan tanpa justifikasi fakta dan undang-undang yang mewajarkan campur tangan di peringkat rayuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Clement Skinner HMR menyampaikan penghakiman mahkamah:

(1) Walaupun tunjang utama aduan terhadap perayu adalah salah nyata frod atau bahawa dia telah membenarkan dirinya digunakan sebagai alat frod, aduan tersebut timbul dalam konteks suatu transaksi tanah melibatkan abang-abang perayu sendiri di mana aduan tersebut termasuk dakwaan bahawa responden telah mempercayai perayu sebagai seorang peguam. Walaupun surat aduan didrafkan dalam terma orang biasa, suatu dakwaan bahawa kepercayaan telah diletakkan oleh responden kepada perayu sebagai peguam yang mengendalikan transaksi tersebut semestinya termasuk harapan bahawa perayu akan menjaga kepentingannya dalam transaksi tersebut.

(2) Dapatan JT adalah berkaitan dengan perkara-perkara yang termasuk dalam rangkuman skop aduan yang disiasat oleh JT. Oleh sebab aduan tersebut tidak terhad kepada persoalan frod semata-mata, hujahan bahawa dapatan utama JT tidak konsisten dengan dapatan subsidiarinya adalah tidak berasas.

(3) HMT, dalam membuat keputusannya, telah melihat laporan yang disediakan oleh JT yang merupakan laporan yang amat terperinci mengandungi dapatan-dapatan fakta oleh JT. Walaupun HMT tidak memberikan alasan-alasan terperinci bagi keputusannya, dengan mengesahkan keputusan LT yang telah menerima dapatan-dapatan dan cadangan-cadangan JT, HMT,

bersidang dalam rayuan, telah dengan jelas memutuskan untuk tidak campur tangan dengan dapatan-dapatan fakta yang dibuat oleh JT.

(4) Dapatan-dapatan oleh JT jelas membuktikan bahawa dalam menjalankan tanggungjawabnya sebagai peguambela dan peguamcara berkaitan dengan transaksi melibatkan responden, tindakan perayu terjumlah kepada salah laku profesional, di mana, dia telah tidak atau memberikan perhatian yang sedikit kepada fakta bahawa wujud konflik kepentingan atau bahawa dia tidak mengendahkan akibat di sebalik konflik tersebut. Perayu juga tidak memberikan atau memberikan hanya sedikit perhatian dalam melindungi kepentingan responden.

(5) Tidak ada alasan untuk campur tangan dengan keputusan LT untuk menggantung perayu daripada amalan selama 18 bulan. LT, sebuah badan yang dibentuk secara statutori memainkan peranan yang penting dalam menegakkan standard tinggi tingkah laku dan etika profesional dalam profesion undang-undang dan bertindak sebagai penjaga tradisi tinggi profesion yang mulia tersebut. Keputusan JT dan LT tidak boleh digambarkan sebagai mustahil sehingga mewajarkan campur tangan rayuan dan hukuman tersebut tidak berlebihan atau tidak seimbang dengan tahap salah laku profesional yang disimpulkan sebagai serius.

Case(s) referred to:

DJ & C Withers (Farms) Ltd v. Ambic Equipment Ltd [2001] EWCA Civ 1362 ***(refd)***

English v. Emery Reimbold & Strick Ltd [2002] EWCA Civ 605 ***(refd)***

Flannery and Anor v. Halifax Estate Agencies Ltd [2000] 1 WLR 377 ***(refd)***

Lim Lek Yan v. Yayasan Melaka [2009] 4 CLJ 665 FC ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Verrechia v. Commissioner of Police of the Metropolis [2002] 1 WLR 2409 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 94(3)(d), (k), (n), (o), 100

For the appellant - N Chandran (Chan Kok Keong, Ranjan Chandran & Goh Ngai Chean with him); M/s Chan & Assocs

For the respondent - Edmund Lim Yun; M/s Hong Chew King & Co

For the disciplinary board - Baba Raj Rajagopal

[Appeal from High Court, Ipoh; Civil Appeal No: 17-28-2007]

Reported by S Barathi

JUDGMENT

Clement Skinner JCA:

[1] We had earlier dismissed the appeal of Ding Siew Ching ("the appellant"). These are our reasons for doing so.

Brief facts

[2] The appellant is an advocate & solicitor practising at Sitiawan, Perak.

[3] By a letter dated 24 December 2004 Mr Ling Peek Hoe ("the respondent") made a complaint against the appellant to the Disciplinary Board of the Bar Council. The essence of the respondent's complaint is contained in para. 3 of his letter which reads:

> I lost 2 pieces of land to Miss Ding's brothers through her fraudulent misrepresentation. I trusted her as a lawyer but she betrayed my trust by allowing herself to be used as an instrument of fraud.

Recommendations Of Investigating Tribunal

[4] Following the complaint received, the Disciplinary Board set up an investigating tribunal pursuant to s. 100 of the Legal Profession Act 1976 ("the LPA") to look into the complaint. On 4 April 2007 after some 12 days of hearing, the investigating tribunal presented its report and its recommendation which reads:

> The Tribunal unanimously agreed that there should be a formal investigation by a Disciplinary Committee on this complaint.

Disciplinary Committee's Findings And Recommendations

[5] A Disciplinary Committee was duly set up on 6 June 2007. On 29 September 2007 after some 12 days of hearing the Disciplinary Committee presented its report. The Disciplinary Committee came to the following findings:

(a) DTB (ie, Ding Toh Biew), Ding Toh Gien and Ding Toh Lie were and are partners of the firm of Golden Star, a moneylending firm and they are also the brothers of the respondent (meaning the appellant here as she was responding to the complaint).

(b) The respondent (appellant) knew or had knowledge of the fact that the complainant was a customer of Golden Star as early as 25 July 1996 as she prepared the consent letters …

(c) … we have no doubt in our mind that the complainant went to the respondent's (appellant's) office … and executed most of the documents without the benefit of advice from an independent source.

(d) The respondent (appellant) had admitted that she prepared, as solicitor for both the parties, the sale and purchase agreements dated 10 March 1997 in relation to No. 59, Taman Ilmu and the sale and purchase agreements dated 27 August 1997, 29 August 1997, 23 December 1998 and 23 December 1998 respectively in respect of Kampong Selamat land and related transfers.

(e) It is our considered view that there was an elementary obligation on the part of the respondent (appellant) to explain to the complainant there was a "conflict of interest" and that it is a situation in which someone in a position of trust, has competing professional interest or personal interest and that such competing interests can make it difficult to fulfil his or her professional duties impartially … we are of the unanimous view that she (the appellant) took no positive steps to avert the consequences of conflict of interest or paid little or no attention to the fact that a conflict of interest existed in the matter. There is no satisfactory evidence indicating or implying that she took any trouble to mitigate the situation either by removal, disclosure, recusal or third party evaluation.

(f) There is sufficient evidence from the oral testimony and the documentary evidence that the respondent (appellant) carried out a lot of work as solicitor for the complainant without the complainant's authority in writing or his knowledge.

(g) In her evidence in chief, the respondent (appellant) repeatedly maintained that the deposit sums or the balance of the purchase price although large, did not pass from the vendors to the purchaser in her presence … Such conflicting actions by the respondent (appellant), brings us to the single and irresistible conclusion that she knew that the deposits and the balance of purchase prices were in fact not paid to the complainant but utilised to contra or settle money lending transactions.

A (h) From the manner in which she conducted the transactions, we doubt very much she maintained her client's account or her office account in any form, leave alone an orderly form.

(i) … respondent (ie, appellant) admitted … that DBT and the
B complainant had, well after the transactions were complete, came to her office to settle their account and on the instructions of DBT she prepared four vouchers, based on the recomputed purchase price of Kg Selamat lands, for signature by the complainant.

C (j) Respondent (appellant) also admitted … that the voucher was amended by her with the use of "liquid paper" so that the date and the amount appeared therein will tally with her computation of the purchase consideration. She was not certain whether she did the correction before or after it was
D signed by the complainant.

(k) Looking at the whole matter in the light of the relationship between the respondent (appellant) and the partners of Golden Star and the manner in which the transactions were
E carried out in a somewhat questionable and unprofessional manner, one is tempted to ask whether the respondent (appellant) carried out her work dishonestly or shut her eyes to an obvious act of dishonesty or acted recklessly in failing to disclose material facts to the complainant. But there is no
F proof beyond reasonable doubt to reach a positive conclusion.

(l) It has been decided in … that in cases of allegation of fraud the standard of proof required is proof beyond reasonable doubt. Since we are bound by judicial decision, we with much
G reluctance, give the benefit of doubt to the respondent (appellant) and accordingly dismiss the complainant's allegation that the respondent (appellant) was guilty of dishonest or fraudulent conduct in the discharge of her duties.

H (m) However, there is ample evidence that the respondent (appellant) had shown little or no regard to safeguard the interest of the complainant.

(n) The respondent (appellant) also allowed DTB a free hand to use her office and facilities to the extent he was messing
I about her office as it pleased him.

(o) As can be seen from the foregoing, there was a serious degree of conflict of interest, a touch of dishonestly and a great deal of lack of professional transparency and we therefore unanimously find the respondent (appellant) in breach of s. 94(3)(d), (k), (n) and (o) of the Legal Profession Act.

[6] The Disciplinary Committee recommended that the appellant be suspended from practice for a period of eighteen (18) months.

Decision Of Disciplinary Board

[7] On 17 November 2007 the Disciplinary Board, after considering the report of the Disciplinary Committee, ordered the suspension of the appellant from acting as an advocate and solicitor for eighteen months.

The High Court Decision

[8] The appellant appealed against for order of the Disciplinary Board to the High Court. On 31 December 2009 the learned High Court Judge in a brief decision held:

> Mahkamah mendapati prosidur-prosidur yang diikuti oleh IT, DC dan DB adalah berbetulan dengan peruntukan-peruntukan dan kuasa-kuasa di bawah Akta. Keputusannya berbetulan dengan fakta-fakta yang dikumpulkan.

[9] The appellant's appeal was accordingly dismissed. The appellant has since obtained a stay of the order of the Disciplinary Board.

This Appeal

[10] Three main issues were raised before us. It was first argued that in cases of disciplinary action against a lawyer, of prime importance is the complaint made. According to the appellant the complaint against her is confined to allegations of fraudulent misrepresentation and fraud. In this regard, the appellant contends that since the Disciplinary Committee had come to a finding that the allegations against her must be dismissed as the allegations had not been proved to the standard required ie, beyond reasonable doubt, it was wrong for the Disciplinary Committee to go on to find that "there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency" in what the appellant had done in respect of the transaction complained of. It is the appellant's case that in coming

to its latter findings, the Disciplinary Committee had clearly exceeded the parameters of the complaint against the appellant. The appellant also contends that the decision of the Disciplinary Committee is riddled with inconsistencies, in that, after having dismissed the complaint, the Disciplinary Committee went on to eventually conclude that there is sufficient merit in the complaint and recommend the appellant be suspended from practice for 18 months.

[11] We do not agree with the appellant's contentions. Although the main thrust of the complaint against the appellant was of fraudulent misrepresentation or that she had allowed herself to be used as an instrument of fraud, the complaint arose in the context of a land transaction involving the appellant's own brothers where the complaint included an allegation that the complainant had trusted the appellant as a lawyer. Even though the letter of complaint was drafted in layman's terms it is our view that an allegation that trust had been reposed by the complainant in the appellant as the lawyer handling the transaction must necessarily include an expectation that the appellant would look after his best interests in the transaction.

[12] We have in an earlier part of this judgment set out some of the findings of fact made by the Disciplinary Committee which clearly indicate that the appellant, as the lawyer involved in the transaction, had put herself in a position of conflict of interest but had failed or taken no positive steps to avert the consequences of such conflict. There were also findings of fact made by the Disciplinary Committee that the appellant had acted for the complainant without the latter's authority in writing or knowledge; that the appellant knew that the deposits and balance of purchase prices were in fact not paid to the complainant but utilised to contra or settle money lending transactions, but yet she made the complainant signed her general vouchers for the balance of the purchase price even though the sums were not released through her office to the complainant; that the appellant admitted to amending a voucher with "liquid paper" so that the date and the amount appearing therein will tally with the purchase consideration.

[13] We therefore find that the Disciplinary Committee's findings that "there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency", were findings in respect of matters which were well within the

scope of the complaint being investigated into by the Disciplinary Committee. Further, the complaint, not being limited to the question of fraud alone, we find no substance to the contention that the main findings of the Disciplinary Committee are inconsistent with its subsidiary findings.

[14] The next issue raised by the appellant was that the learned High Court Judge did not hand down his written grounds of judgment. The appellant complains that by not doing so the learned judge had failed in his duty to explain the reasons for his decision which in itself constitutes sufficient reason for an appellate court to intervene and set aside the judgment of the High Court. In support the appellant referred us to the following cases: *Flannery and Anor v. Halifax Estate Agencies Ltd* [2000] 1 WLR 377, *English v. Emery Reimbold & Strick Ltd* [2002] EWCA Civ 605, *DJ & C Withers (Farms) Ltd v. Ambic Equipment Ltd* [2001] EWCA Civ 1362, *Verrechia v. Commissioner of Police of the Metropolis* [2002] 1 WLR 2409, *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812 and *Lim Lek Yan v. Yayasan Melaka* [2009] 4 CLJ 665; [2010] 1 MLJ 173.

[15] Referring to the decision of the Federal Court in *Lim Lek Yan v. Yayasan Melaka* (*supra*) where it was held that whether written grounds of decision are required or not depends on the facts in each and every case, it was the contention of the appellant that this present case is certainly of a nature where the written grounds of decision of the High Court Judge are required to assist this court in determining whether from the totality of the facts before the learned judge, including the facts as adverted to in the report of the Disciplinary Committee the suspension of the appellant for a period of 18 months from practice is tenable both on the facts and in law.

[16] We have given this issue our anxious consideration and asked ourselves whether the lack of written grounds had deprived the appellant of due process and therefore to justice. We find it has not for the following reasons. The learned judge did not sit as a trial judge listening to the testimony of witnesses and evaluating their evidence. That function was undertaken by the Disciplinary Committee. In this case the learned High Court Judge was exercising appellate jurisdiction. In arriving at his decision the learned High Court Judge had the benefit of the report prepared by the Disciplinary Committee which was a very detailed report

containing the findings of facts of the Disciplinary Committee upon the evidence led before it as well as the recommendations of the Disciplinary Committee upon those findings of fact. Even though the learned judge did not give detailed reasons for his decision, by affirming the decision of the Disciplinary Board which had accepted the findings and the recommendations of the Disciplinary Committee, the learned High Court Judge, sitting in appeal had clearly decided not to interfere with the findings of fact made by the Disciplinary Committee. After reading the record of appeal we find the learned High Court Judge was right in not doing so.

[17] This appeal proceeds before us by way of a rehearing and to assist us in arriving at our decision we have before us the same reports that were placed before the learned High Court Judge. Before us the appellant has raised the same grounds and issues that she raised before the High Court Judge, with the exception of the point on whether the investigating tribunal and the Disciplinary Committee had delivered their reports within the time allowed under the LPA, but that was a ground which it was not open to the appellant to take before the High Court in any event as she had never raised it as one of her grounds in her memorandum of appeal. Accordingly we do not find that this appeal should be allowed solely for the reason that the learned High Court Judge failed to write his grounds of judgment.

[18] The appellant's final point is that the imposition on her of an 18 months period of suspension from practice by way of punishment is manifestly excessive, disproportionate and without factual or legal justification warranting appellate intervention.

[19] We do not agree. In our judgment the findings of the Disciplinary Committee clearly establishes that in carrying out her duties as an advocate & solicitor in relation to the transaction involving the respondent here, the appellant's conduct had amounted to professional misconduct, in that, she had paid little or no attention to the fact that a conflict of interest existed or that she was not bothered with the consequence of such conflict. Further, that the appellant had shown little or no regard to safeguard the interest of the respondent here.

[20] The Disciplinary Committee described the misconduct as serious and drew attention to the fact that a judge in a neighbouring jurisdiction had observed that misconduct in practice by a lawyer has an impact on public confidence which, if left

unchecked, will inexorably undermine the dignity of the legal profession and erode the very essence of the solicitor-client relationship. The Disciplinary Board accepted the findings and recommendation of the Disciplinary Committee to suspend the appellant. We agree with counsel for the respondent that the Disciplinary Board, a statutorily constituted body of persons, plays an important role in upholding the high standards of professional conduct and etiquette in the legal profession and acts as the custodian of the high traditions of the noble profession. We find no reason to interfere with the decision of the Disciplinary Board to suspend the appellant from practice for 18 months. The decision of the Disciplinary Committee or of the Disciplinary Board cannot be described as being absurd so as to warrant appellate interference. Nor do we find the punishment excessive or disproportionate to the degree of professional misconduct of the appellant which was described as serious.

[21] It was for all the above reasons that we dismissed the appellant's appeal with costs of RM10,000 to the first respondent, deposit to be refunded.